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No. 97- OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

LEONARD VINCI,

Petitioner,

v.

WASTE MANAGEMENT, INC., an Illinois corporation;
WASTE MANAGEMENT OF ALAMEDA COUNTY,

Respondents.

**Supplemental Appendix to the
Petition for a Writ of Certiorari to the
SUPREME COURT OF THE UNITED STATES**

SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Leonard G. VINCI, Plaintiff,
v.
WASTE MANAGEMENT, INC., an Illinois corporation, and Waste Management of Alameda County, a California corporation, Defendants.

No. C 94-1946 FMS.

United States District Court,
N.D. California.

Aug. 25, 1994.

ORDER OF DISMISSAL

FERN M. SMITH, District Judge.

ISSUES

*1 Defendant's motion to dismiss requires the Court to determine whether plaintiff can maintain a treble damages action against the defendant under the Clayton Act, 15 U.S.C. § 15 (1994), for defendant's alleged violation of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1994). The Court must also decide whether plaintiff has standing to seek damages for breach of contract and whether his claim for intentional infliction of emotional distress is time-barred.

BACKGROUND

In 1989, plaintiff Leonard Vinci ("Vinci"), entered into a settlement agreement with defendant Waste Management, Inc. ("Waste Management"), involving his company, Vinci Enterprises, Inc. ("VEI"), and an acquired subsidiary of Waste Management, Oakland Scavenger (now known as Waste Management of Alameda County). Under the agreement, defendant allegedly promised to provide Vinci and/or VEI [FN1] substantial quantities of recyclable materials. Subsequently, Waste Management employed Vinci who was then terminated in December, 1992.

Vinci alleges that Waste Management breached the settlement agreement in order to drive Vinci out of business and to control competition in the

recycling business. The alleged breach included: (a) encouraging other recycling haulers to solicit accounts from Waste Management to take business away from VEI; (b) refusing to deliver specific accounts to VEI; (c) diverting accounts from VEI; (d) intercepting and diverting materials destined for VEI; (e) procrastinating in procuring a lucrative account promised for VEI. Vinci further alleges that Waste Management employed Vinci in order to prevent him from providing relevant testimony in an alleged lawsuit involving Vinci's successor and Waste Management. Vinci alleges that, during the course of his employment, he was repeatedly asked to cooperate with Waste Management's predatory schemes and conspiracies designed to destroy competition in the recycling business. He further alleges that he was ultimately terminated for refusing to assist in these illegal activities.

Vinci filed an action in California Superior Court on January 12, 1994, alleging antitrust claims under the California Cartwright Act, Cal.B. & P.Code § 16,700, et seq, which were virtually identical to the claims made by Vinci here. The claims were dismissed by a demurrer.

Vinci filed this action against Waste Management and Waste Management of Alameda County for violation of the Sherman Act and for breach of contract and intentional infliction of emotional distress. Waste Management filed this motion to dismiss under Fed.R.Civ.P. 12(b)(6) based on Vinci's lack of antitrust standing and, alternatively, for Vinci's failure to allege a Sherman Act violation by Waste Management. Waste Management also seeks to dismiss Vinci's claim of intentional infliction of emotional distress as time-barred and Vinci's contract claim based on lack of standing and failure to allege the necessary elements for breach of contract.

DISCUSSION

I. The Legal Standard

*2 A motion to dismiss pursuant to Rule 12(b)(6) tests only the sufficiency of the complaint. North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir.1983). Dismissal of an action pursuant to Rule 12(b)(6) is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th Cir.1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02 (1957)). In reviewing the motion, the Court must assume all factual

allegations to be true and must construe them in the light most favorable to the nonmoving party. North Star, 720 F.2d at 580. The Court may dismiss the complaint, or any claims within it, for failure to state a claim if it "appear[s] to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved." Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir.1987). In considering a motion to dismiss, the district court must take all allegations of material fact as true and construe them in the light most favorable to the non-moving party. Id.

II. Vinci Lacks Antitrust Standing to Sue Waste Management Under the Clayton Act

Antitrust standing derives from section 4 of the Clayton Act which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court for the United States ... and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fees." 15 U.S.C. § 15 (1994).

Although a literal reading of the statute arguably encompasses almost every conceivable harm remotely related to antitrust violations, "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might be traced to an antitrust violation." Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters ("AGC "), 459 U.S. 519, 103 S.Ct. 897, 906 (1983) (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 92 S.Ct. 885, 891 n. 14 (1972)). A plaintiff "must prove more than injury causally linked to an illegal presence in the market." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690, 697 (1977). In order to recover threefold damages under 15 U.S.C. § 15, "a plaintiff must prove the existence of 'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.' " Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S.Ct. 1884, 1889 (1990) (quoting Brunswick, 97 S.Ct. at 697 (emphasis in original)). An injury will not qualify as an "antitrust injury" unless it is attributable to an anti-competitive aspect of the defendant's practices. Id. The determination of antitrust standing "is a question of law." Bubar v. Ampco Foods, Inc., 752 F.2d 445, 449 (9th Cir.1985).

*3 Vinci alleges that he was directly harmed as a result of Waste Management's efforts to eliminate his presence in the relevant marketplace.

This was allegedly accomplished by first forcing him from the business of recycling and then firing him due to his refusal to cooperate in a predatory price plan. The Court must evaluate Vinci's antitrust standing under both scenarios.

At oral argument, counsel for plaintiff suggested that evaluating Vinci's antitrust claims separately (i.e. as shareholder of a competing corporation and as employee of defendant) disregards the teaching of Continental Ore Co. v. Union Carbide, 370 U.S. 690, 82 S.Ct. 1404 (1962). In Continental Ore, a series of acts performed in furtherance of a conspiracy by "defendants and others acting in concert with them" resulted in harm to a plaintiff corporation's business. Id. at 1407-08. The Supreme Court ruled that, in determining defendant's liability, the individual acts by the co-conspirators against the corporation should not be treated as "separate and unrelated lawsuits." Id. at 1410.

This Court's analysis does not run counter to the above principle. Vinci's claims allege separate harms to two distinct legal entities--harm to the corporation of which he is a shareholder and harm to Vinci personally, as a Waste Management employee. A separate analysis of these claims is essential in order to properly distill the legal issues involved in each, be fair to the litigants, and not threaten to obfuscate the presence of any alleged conspiracy.

A. Vinci Lacks Antitrust Standing as a Shareholder of an Injured Corporation

"A shareholder of a corporation injured by antitrust violations has no standing to sue in his or her name...." Solinger v. A & M Records, Inc., 718 F.2d 298, 299 (9th Cir.1983). This rule is applicable even if the injured shareholder is the sole stockholder of the corporation. Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 439 (9th Cir.1979).

Vinci's complaint alleges that Waste Management deprived VEI of recyclable material needed to continue operations through a variety of anti-competitive practices intended to drive Vinci out of business. As a competitor of Waste Management in the relevant marketplace, VEI would have standing to file suit under the Clayton Act for any alleged wrongdoing on the part of Waste Management. See AGC, 103 S.Ct. at 908. Vinci contends, however, that he should be given individual antitrust standing because Waste Management's practices were targeted directly at him and

were intended to put Vinci himself out of business. This argument lacks merit.

In Stein v. U.A. Corp., 691 F.2d 885 (9th Cir.1982), the primary shareholder and officer of a corporation attempted to sue the defendant corporation for antitrust injuries. Like Vinci, Stein alleged that the defendant's actions were intended "to drive him out of the industry." Id. at 897 (emphasis added). In denying standing to the individual shareholder, the court noted that regardless of whether the actions taken were focused on the corporation or the individual shareholder, the apparent wrongdoing was carried out against the corporation. Id.

*4 As in Stein, Vinci alleges wrongful acts carried out against the injured corporation, VEI. Accordingly, the Court finds that Vinci lacks antitrust standing solely by virtue of his status as a VEI shareholder.

B. Vinci Lacks Antitrust Standing as an Employee that was Terminated by Waste Management

The Supreme Court has enunciated various policy factors that courts should consider in determining whether a class of plaintiffs should be allowed to bring suit under 15 U.S.C. § 15:

(1) whether the alleged injury is of the type the antitrust laws were intended to forestall;
(2) the directness of the injury;
(3) the speculative measure of the harm;
(4) the risk of duplicative recovery;
(5) the complexity in apportioning damages.

Bubar, 752 F.2d at 448-49. These factors favor antitrust standing for consumers of products or services (see Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540 (1982)) and competitors in the market in which trade is restrained (see United States v. Topco Assoc., Inc., 405 U.S. 596, 92 S.Ct. 1126 (1972)). AGC, 103 S.Ct. at 908-09.

In addition, the Ninth Circuit has allowed an employee that has been terminated by a corporation to sue his employer under the Clayton Act. Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739 (9th Cir.1984). In Ostrofe, the plaintiff was forced to resign as marketing director for the defendant corporation because he refused to take part in a conspiracy to restrain trade in violation of 15 U.S.C. § 1. Id. at 741-42. The plaintiff violated the agreement between the defendant corporation and the

co-conspirator corporations by soliciting accounts with businesses not involved in the conspiracy. The plaintiff was then forced to resign his position and boycotted from future employment in the industry. Id. The court held that conferring antitrust standing on this plaintiff was consistent with the purposes of the Clayton Act. Id. at 747.

As subsequent Ninth Circuit opinions have noted, the marketing director in Ostrofe was granted antitrust standing because (1) his injury was directly caused by an intentional boycott of his services; (2) his injury was of a type the antitrust laws were intended to prevent; and (3) he was the natural vindicator of the antitrust violation. Lucas v. Bechtel Corp., 800 F.2d 839, 846 (9th Cir.1986) (citing Ostrofe, 740 F.2d at 742-43).

Vinci maintains that Ostrofe is directly on point, compelling denial of Waste Management's motion to dismiss. Ostrofe, however, is readily distinguishable and its application to the facts of this case would unnecessarily expand a relatively narrow holding of the ninth circuit. [FN2]

1. Vinci's Alleged Injury was not Caused by an Intentional Boycott of His Services

Vinci has not alleged in his complaint an intentional boycott of his services. This factor is of particular importance because the court in Ostrofe expressly based its holding on the presence of the boycott. [FN3]

2. Vinci's Alleged Injury was not of a Type the Antitrust Laws Were Intended to Prevent

*5 "The requirement that the alleged injury be related to anticompetitive behavior requires as a corollary, that the injured party be a participant in the same market as the alleged malefactors." Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 (9th Cir.1985). "In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 540 (9th Cir.1987). This factor is of "tremendous significance", Bhan, 772 F.2d at 1470 n. 3, and weighs heavily against those who are neither competitors nor consumers. Lucas, 800 F.2d at 844.

Although the plaintiff in Ostrofe was neither a competitor nor a consumer, his position as marketing director was critical to the success of the price-fixing agreement, and his failure to participate in the conspiracy by his employer "stood as a clear impediment to its effectuation." Exhibitors' Serv., Inc. v. American Multi-Cinema, 788 F.2d 574, 580 (9th Cir.1986) (citing Ostrofe, 740 F.2d at 745-46). "Ostrofe was an 'essential participant' in the scheme, which could not succeed without his active participation.' " Id. (quoting Ostrofe, 740 F.2d at 745-46). A plaintiff can, therefore, satisfy the participant in the marketplace prong if his injury is "inextricably intertwined" with the antitrust violation. Fallis v. Pendleton Woolen Mills, Inc., 866 F.2d 209, 211 (6th Cir.1989).

Vinci is neither a consumer nor a competitor in the same market as Waste Management. This fact alone "weighs heavily" against Vinci but does not automatically preclude standing. Id. at 211. What does ultimately prove fatal to Vinci's claim of antitrust standing is his failure to allege facts showing that his injury is "inextricably intertwined" with Waste Management's alleged antitrust violation. Vinci has not alleged that he was an "essential participant" in Waste Management's alleged conspiracy or that the conspiracy could not succeed without his participation. He, therefore, has no standing to pursue the alleged antitrust violations.

This conclusion finds support in the state court's disposition of Vinci's claims against Waste Management under the Cartwright Act, Business & Professions Code § 16,700 et seq (analogous to the Sherman Act). Vinci v. Waste Management, Inc., No. 957805 (Cal.Super.Ct. May 4, 1994) ("Vinci ") (order sustaining defendant's demurrer in part and overruling it in part). The San Francisco Superior Court (Cahill, J.) sustained Waste Management's demurrer and specifically declined to extend antitrust standing to Vinci under Ostrofe, noting that "[Ostrofe] requires that a fired employee must show that the antitrust violation will be unremedied without the employee's lawsuit and that the Plaintiff is an essential participant in the alleged wrongful conduct and that the conduct could not succeed without his cooperation." Id.

3. Vinci is not the Natural Vindicator of Waste Management's Alleged Antitrust Violation

*6 "The 'existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust

enforcement diminishes the justification for allowing a more remote party ... to perform the office of a private attorney general.' " Atlantic Richfield, 110 S.Ct. at 1895.

According to Vinci's complaint, Waste Management's alleged antitrust violation primarily involved an attempt to monopolize the garbage collection and recycling business through a series of acquisitions and the use of predatory means to destroy competitors. Vinci's injury is a byproduct of the alleged antitrust violation; the wrongful result Waste Management allegedly sought was the reduction of competition and competitors. See Fallis, 866 F.2d at 211. Waste Management's "competitors are much more immediate victims of the alleged conspiracy." Lucas, 800 F.2d at 844.

Ostrofe is distinguishable here as well. The court in Ostrofe noted that although others might have been more directly victimized by the alleged conspiracy, it was unlikely that anyone else would have "equal incentive to bring the antitrust violators to account" and would therefore leave a significant antitrust violation unremedied. Ostrofe, 740 F.2d at 747. In this case, however, Waste Management's competitors would be directly injured and would have ample incentive to seek relief under the Clayton Act, if their existence was threatened by Waste Management's practices. Any alleged antitrust violation would, therefore, not go undetected if Vinci is denied standing. [FN4]

III. Vinci Has Failed to Allege a Sherman Act Violation

The Sherman Act distinguishes between concerted and independent actions. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S.Ct. 1464, 1469 (1984). Section 1 of the Act reaches unreasonable restraints of trade effected by a conspiracy between separate entities. Copperweld Corp. v. Independence Tribe Corp., 467 U.S. 752, 104 S.Ct. 2731, 2740. Employees of a firm "do not provide the plurality of actors imperative for a section 1 conspiracy," nor does "the coordinated activity of a parent and its wholly owned subsidiary." Id. at 2741. Vinci sued only Waste Management and its subsidiary, Waste Management of Alameda County, and failed to allege in his complaint a "contract, combination ... or conspiracy between separate entities." Id. at 2740 (emphasis in original). The only multi-party conduct alleged in Vinci's complaint is Waste Management's intentional encouragement of other recycling haulers to solicit accounts from Waste Management. Such encouragement is not

necessarily a section 1 agreement; furthermore, Vinci fails to allege that anyone other than Waste Management ever had any wrongful intent. See, e.g. Monsanto, 104 S.Ct. at 1473. [FN5]

The conduct of a single firm is governed by 15 U.S.C. § 2 and is unlawful only when the firm's conduct poses a danger of monopolization. Copperweld, 104 S.Ct. at 2739-740. An attempted monopolization claim has three essential elements: (1) specific intent to eliminate competition; (2) anticompetitive conduct directed at accomplishing this unlawful objective; and (3) "a dangerous probability of success." Thurman Indus. v. Pay 'N Pak Stores, 875 F.2d 1369, 1378 (9th Cir.1989). Vinci has failed to allege in his complaint both specific intent and likelihood of success of an attempted monopoly. The absence of these elements in Vinci's complaint makes it susceptible to a motion for dismissal. See Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 736 (9th Cir.1987).

*7 For these reasons, the Court finds that Vinci has failed to allege a claim against Waste Management consistent with a violation of the Sherman Act.

IV. Vinci Lacks Standing to File the Breach of Contract Claim Against Waste Management

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." Cal.Code Civ.P. § 367. Vinci's breach of contract claim revolves around Waste Management's alleged breach of a settlement agreement between Waste Management and VEI. As a shareholder of VEI, Vinci does not have a cause of action for damages to the corporation. Anderson v. Derrick, 220 Cal. 770, 773 (1934). It is VEI, not Vinci, that contracted with Waste Management; therefore, only VEI can seek judicial enforcement of the agreement.

V. Vinci's Intentional Infliction of Emotional Distress Claim is Time-Barred

Personal injury torts are foreclosed, by statute, after one year. Cal.Code Civ.P. § 340. This includes actions based on intentional infliction of emotional distress. Eisenberg v. Ins. Co. of North America, 815 F.2d 1285, 1292 (9th Cir.1987). Vinci was terminated by Waste Management

on December 2, 1992, and his complaint was filed more than one year later, on June 1, 1994. Vinci's claim is time-barred.

Conclusion

For all the reasons herein set forth, the Court grants defendant's motion to dismiss this complaint. The claim for intentional infliction of emotional distress is dismissed with prejudice. For all remaining causes of action, the Court dismisses without prejudice and grants plaintiff fifteen days (15) from issuance of this Order to properly allege standing and a cognizable Sherman Act claim. Any amended complaint filed pursuant to this Order shall include a copy of the alleged settlement agreement.

SO ORDERED.

FN1. Plaintiff did not include a copy of the settlement agreement with the complaint.

FN2. See, e.g. Gregory Marketing Corp. v. Wakefern Food Corp., 787 F.2d 92, 96 (3d. Cir.1986) (the view that discharged employees have antitrust standing generally rejected); Rafferty v. Nynex Corp., 744 F.Supp. 324 (D.D.C.1990) (most courts which have considered the issue in Ostrofe have rejected the holding); Boisjoly v. Morton Thiokol, Inc., 706 F.Supp. 795, 805 (D.Utah 1988) ("Ostrofe's holding is ... contrary to virtually all other decisions addressing the issue."); Winther v. DEC Int'l, Inc., 625 F.Supp. 100, 103 (D.Colo.1985) ("Nothing in Associated General Contractors supports [Ostrofe 's] interpretation of the scope of antitrust law.").

FN3. Ostrofe first reached the Ninth Circuit in 1982 where the court found standing. Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir.1982) ("Ostrofe I "). The Supreme Court vacated this holding and remanded "for further consideration in light of [AGC]." 460 U.S. 1007 (1983). On remand, the ninth circuit noted that AGC did not dictate reversal even if the court had "expanded" the concept of "antitrust injury" too broadly. Ostrofe, 740 F.2d at 746. This conclusion was predicated on a footnote in the majority opinion of AGC which reserved the question "of whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the

ultimate purpose of the boycott is to restrain competition in the relevant economic market." Id. (quoting AGC, 103 S.Ct. at 910 n. 44).

FN4. See also Vinci, No. 957805 at 2.

FN5. 15 U.S.C. § 1 requires a claimant to allege and prove three elements: "(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; (3) which actually injures competition." Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 507 (9th Cir.1989).